U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

JUN 18 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]

Beneficiar

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the business of taekwondo instruction. It seeks to employ the beneficiary permanently in the United States as an instructor. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $18.12 per hour or $37,689.60 per year.

Counsel initially submitted the petitioner's 2001 tax return, deemed insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 13, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE exacted, for 2001 to the present, the petitioner's original computer printouts from the Internal Revenue Service (IRS) of date-stamped federal tax returns submitted by the petitioning corporation. The RFE asked, also, for the submission of evidence of experience, as required in Part A, block 14 of the ETA 750, including the hours worked per week.

Counsel submitted the printout, with taxpayer identification number 95-4827745 (ID95), for the petitioner's 2001 Form 1120, a U.S. Corporation Income Tax Return. It reported a 2001 taxable loss of ($4,118), less than the proffered wage. The Form 1120, Schedule L, for 2001 reported current assets of $5,701 and current liabilities of $800 at the end of the year, the difference of which is less than the proffered wage. The employer's quarterly federal tax return (Form 941) and the 2001 Form 1120 reflected that the petitioning corporation paid $18,400 in salaries and wages, but no compensation for the beneficiary. Finally, counsel included the 2001 Form 1040, U.S. Individual Income Tax Return, related to two (2) social security numbers (SSNID). The 2001 Form 1040 stated adjusted gross income (AGI) of $18,400.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present, and denied the petition.

On appeal, counsel submits two (2) account statements of Hanmi Bank, dated April 2, 2003. One shows a certification of deposit of $35,000, opened on April 3, 2003, and the other a business checking account with a balance, on April 2, 2003, of $10,027.64. The information states that the checking account was opened on January 10, 2001, but gives no amount.

Counsel states, on appeal, only that these bank statements:

> . . . show that the employer had sufficient funds from which to cover the foreign worker's wages, from April 30, 2001, when the priority date was established. The [bank statements] should be seen as supplementary as to what had been submitted earlier. If so, they will cover any amount that was uncovered and resulted in the denial.

On the contrary, the certification of deposit does not relate to the priority date, since the holder did not open it until April 3, 2003. Moreover, the petitioner has not shown that the checking account balance represents "supplementary" funds more than the $5,701, already in the balance sheet of the ID95 tax printouts, *supra*. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner offered two (2) individuals AGI of $18,400, as reported in the Form 1040 relative to the SSNID. Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS), formerly the Service or INS, may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In any event, no sum is equal to, or greater than, the proffered wage as of the priority date. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility as of the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

Though it is beyond the scope of the director's decision, the RFE specifically requested the hours worked in connection with the evidence of experience, as required in Part A, block 14 of the ETA 750. The prior employer's letter does not attest to full time experience. Employment is defined as permanent, full time work. 20 C.F.R. § 656.3, *Employment.* Though not a basis of the AAO's decision, the evidence did not comply with this regulation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.